Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 25.

JOHN M. WARD, APPELLANT,

vs.

MOSES H. SHERMAN AND DAVID HARDENBERG.

Reply Brief for Appellant.

The supplemental brief for appellees assumes an erroneous premise of fact, to wit, that appellant, Ward, rescinded the contract of September 12, 1894, by bringing suit for $1,500 as upon an *unsecured* balance of the original Hardenberg note for $12,500.

Contra, his pleading in that suit was in exact accord with the contract and all his actions under it. There was no evasion or rescission thereof, because:

A. The suit was, in effect, to recover the $1,500 value of cattle, which the company, through Hardenberg, had sold *after* the agreement of September 12, 1894, and for which they had in terms agreed to account. This is made plain by the evidence, which is in complete harmony with this lawful demand Ward was thereby seeking to enforce. That

the company, under its agreement, was required to account for such cattle as had been sold since September 1, 1894, is conceded by counsel for appellee (Supplemental Brief for Appellee, p. 5).

B. In respect of any technical objection as to *form*, this was the sole and only purpose of the suit. By the suit Ward demonstrated his faithful observance of the agreement by demanding only what was due under the agreement—not a dollar more. If Ward intended to repudiate the agreement, that intent would become evident only on his suing for the entire note—default having occurred—and by seeking to foreclose under the mortgage.

C. As clearly shown in our main brief, Ward was not obligated to cancel the notes and discharge the mortgage upon the record *until* and *after* defendants had kept their antecedent promise of the agreement to formally reconvey the property to him; as well, also, to deliver possession of *all* thereof to him.

D. The argument that the contract of September, 1894, was *entire* may be admitted for all the purposes of this case. Ward kept all his agreements and promises under the contract, even *after* the other parties had failed to keep theirs by making or tendering any reconveyance of the property to him. They failed to do so for nearly five years after this suit was brought. They never have tendered such conveyance, although by the express language of the contract such conveyance was to be made by them within thirty days after the making of the contract—September 12, 1894.

E. Appellees, having committed the *primary* breach of the contract, cannot be heard to say that because Ward went into possession thereunder, and because he sued to recover the amount due under their agreement, waiving all the bal-

ance and declaring by his pleadings that the mortgage was non-existent and the balance sued for—$1,500—was an unsecured demand, thereby *on the record affirming* the obligations of the contract as they affected him, Ward has rescinded the contract or committed any breach thereof. They have clearly failed to perform their part of the contract. Ward faithfully performed his and admitted on the record, by his own sworn pleadings, that he stood bound thereby. It is hence erroneous to now contend that in any manner Ward has rescinded or abrogated the contract. The contrary alone is the fact.

F. On such untenable argument it is equally erroneous to say that Ward was in possession only as mortgagee. By express contract he resumed possession as *owner*. The contract was not unjust or fraudulent as to them. Ward offered to largely discount the mortgage debt by striking off $5,000 thereof. They declined his offer, and thereupon he accepted their original proposition to take possession—receive formal conveyance and then cancel the notes and mortgage. Their *precedent* promises have not been kept. Yet Ward has not sued to recover upon the mortgage or to foreclose, but simply to recover the balance due him under the agreement.

This renders all the remainder of the supplemental brief of no practical importance in the discussion of the case. Its foundation premise being erroneous both in fact and law, the superstructure of argument built thereon necessarily falls.

In *Wiggins Ferry Co. vs. O. & M. Railway* (142 U. S., 396), this court pertinently said (p. 415):

> "Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible. A mistaken view of one's rights or remedies should not be permitted wholly to defeat a claim founded upon principles of equity and justice, and if the pleadings can be so amended as to admit proof of such claim, and such

> amendment does not introduce a new cause of action, though it may set up a new measure of damages, or work a real hardship to the party defendant, it is within the discretion even of the appellate court to permit such amendment to be made (*Schooner Anne vs. United States*, 7 Cranch, 570)."

We submit this doctrine has plain application here. If the appellant's pleading was inartificially drawn, or was deficient in form, it is manifest that his claim "is founded upon principles of equity and justice," and his pleading can well be harmonized with that substantial justice which it is plain he is entitled to receive.

That the supreme court of Arizona erred in refusing to hear and determine the case upon the merits is obvious from the following considerations:

In *Salina Stock Company vs. Salina Creek Company* (163 U. S., 109, 118), a case from the supreme court of Utah Territory, this court said:

> "Without denying the authority of this court to find error in the judgment of the supreme court of a Territory, even in passing on a question of practice, we certainly should not feel inclined to exercise such authority unless we were able to perceive that injustice had been done."

Injustice was done in the case at bar because (1) the practice act of Arizona provides (Main Brief, p. 26):

> "SEC. 1. Whenever an appeal or writ of error is taken from any district or circuit court of this Territory to the supreme court of the Territory the appellant or plaintiff in error, as the case may be, may have the testimony taken in the case transcribed and certified by the court reporter and file the same with the papers in the case, and thereupon it shall become and be a part of the record in such case."

The clerk of the trial court certified the record to the supreme court of Arizona (Rec., 40) under the following certificate:

> "I hereby certify and transmit to you the entire record in said cause; including original papers on file in this court, and all minute orders in the case; the decision and judgment rendered in said cause by this court, and entered of record therein, together with the testimony taken in the case as transcribed and certified to by the court reporter, and filed as a part of the record in this cause."

The supreme court of Arizona therefore had before it the *entire* record. The cause went to that court by appeal, and was, first, in the nature of a suit in equity; and, second, was tried by the court below without a jury. What was the measure of duty cast upon the supreme court of Arizona in an appeal case and with the entire record before it?

The inquiry is answered by the decision of this court in *Stringfellow vs. Cain* (99 U. S., 610), where, in speaking of the civil practice act of Utah, this court said:

> "When an appeal is taken to the supreme court of the Territory the law requires a statement to be settled and signed by the judge who heard the cause, which shall set forth 'specifically the particular errors or grounds' relied on 'and contains so much of the 'evidence as may be necessary to explain the particu-'lar errors or grounds specified and no more.' This statement is annexed to the copy of the judgment roll or order appealed from and furnished to the supreme court. Comp. Laws Utah, 1876, 493, 494.
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> "The statement settled and signed in this cause, annexed to the copy of the order refusing a new trial appealed from, contained all the 'testimony, written proofs, and statements of the parties' certified up from the probate court, and upon which the trial was had; and it was stipulated that the statement on the appeal from this order might be used, so far as applicable, on the appeal from the judgment. Thus the

> proceeding was made to conform to the regulations of the practice act in reference to appeals in civil actions, and the court was called upon to decide whether the evidence was sufficient to sustain the findings of fact, and, if it was, whether the facts as found would support the judgment. *In short, the supreme court of the Territory was called upon to determine whether, according to the justice of the case as shown by the record, the judgment of the district court was right.*"

The practice act of Arizona quoted *supra* is substantially similar in this respect to the practice act of Utah, and it was hence clearly the duty of the court in the case at bar to examine the whole record, even upon the broad assignment of error that the judgment and findings of the trial court were contrary to the evidence.

Such is the duty and the constant experience of this court in appeal causes coming up from the Federal courts.

As merely illustrative, we cite the case of *Lalone vs. The United States* (164 U. S., 255). That was a suit in equity, wherein the United States sought to recover certain pension moneys alleged to have been paid upon fraudulent proof. The circuit court sustained the prayers of the bill, holding that by the preponderance of evidence submitted in the cause the United States was entitled to such relief. As the appeal transferred to this court the entire cause, it could not be here determined without this court's review of all the testimony. The substantial error assigned in this court was that the testimony did not justify the findings of fraud alleged. Without suggestion of any insufficiency in such assignment, this court proceeded to examine with minute care a record of testimony many times more voluminous than the record of testimony presented to the supreme court of Arizona in the case at bar, and thereon reversed the decree below and directed dismissal of the Government's bill. What this court may thus do in the discharge of its duty, certainly the supreme court of Arizona should do in like discharge of duty

Moreover, the case was fully argued at the bar in the supreme court of Arizona, as appears from the minute entries on the journal of that court (Rec., 96), which recites:

> "This cause coming on for hearing was argued by Mr. Jos. H. Kibbey and E. J. Edwards for appellant and Mr. C. F. Ainsworth and Mr. C. N. Sterry for appellees, and cause ordered submitted.
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> "On motion of Mr. Jos. H. Kibbey, it is ordered that appellant have permission to file supplemental brief herein."

Therefore the case was both fully argued orally and on original and supplemental brief, submitted for appellant as well.

Again, the petition for rehearing submitted by appellant's counsel in that court (Rec., 92) pertinently said:

> "Again, when *all* the evidence has to be considered to determine whether it supports a verdict or finding it is specific as it can be made, we submit, to say that the evidence (all of it taken together) is not sufficient to support the finding; wherein it is insufficient cannot be specified because it all must be considered. Does it in the aggregate support the finding?
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> "It is to be remembered that there was little or no conflict of evidence. It is not a case where one or several items of conflict could be picked out and specified.
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> "The question whether Ward, the appellant, was a mortgagee in possession or not is one of law apparent on the face of the pleadings and is fundamental.
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> "The question whether the judgment of the court is contrary to law is apparent upon an examination of *all* the evidence, not any specific part of it or any part of it less than the whole. If it be conceded that Ward was a mortgagee in possession then would not the proper judgment be that he account.
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> "We concede the rule generally as asserted by the court. But in construing it we may advert to the reason of it when we seek to apply it. No one was misled; no one, either of court or counsel, was preju-

diced or put to any extra care, trouble or labor to ascertain the errors complained of. Appellant fully stated them in the very paper embodying the assignments of error. The appellee understood them and answered the objections.

"It certainly cannot be said that either the court or counsel were not apprised of the merits of dispute, plainly and distinctly called to their attention and receiving their consideration.

"The enforcement of a rule when the reason for it is absent does not promote justice. It may punish the lawyer, it is true, but that is not the purpose, we submit.

"If this judgment is unjust—if it is unwarranted by law—if it is against the law, then it seems to me that the court should rather seek a reason to exercise its powers to do justice than to avoid a consideration of the merits of the case."

Now, in face of all this plain reasoning, the opinion of the supreme court below in affirming the judgment of the trial court condemns as wholly insufficient *all* the assignments of error. Of course errors 1 and 2, relating to the admission or rejection of evidence, were insufficient, because they did not apprise the court to what evidence such alleged errors were addressed. But assignments of error 3, 4, and 5 clearly and distinctly declare that the evidence did not sustain the judgment or findings of the court, and that hence the judgment was contrary both to the law and the evidence. This was plainly all-sufficient, since and beyond all question it was necessary for the court to review the evidence as a whole in order to reach a just conclusion, precisely as this court did in *Lalone vs. United States, supra.*

Where such form of error was assigned it was impossible, except on brief and oral argument, to further develop the reasons on which such broad and fundamental error was thus assigned. In no court and under no practice would it be necessary or proper to include in such an assignment of error a recital of all of the evidence; but that part of the rec-

ord in which the evidence appears is by necessary intendment and the reasonable exercise of common sense incorporated into and made a part of such form of assignment.

Undoubtedly, and speaking broadly, the assignment of errors, as its office and purpose indicates, is to draw the attention of the court to the specific error on which the appellant relies; but it is manifest that where the court has power and jurisdiction to review on appeal the entire cause and the appellant insists that upon the whole evidence the judgment below was incorrect, such form of assignment is sufficient in law and reason, and must require the court to review the whole of the evidence. Like a demurrer to evidence, such form of assignment of error brings into review *all* the evidence.

Notwithstanding all this, however, the opinion of the supreme court of Arizona in this case condemns all the errors assigned, and thereby the court excluded from review and consideration the *evidence* taken in the cause on which this broad and fundamental error was duly assigned and lawfully predicated.

Having thus ignored all the evidence, the court then in a few words declares that it found no error "appearing upon the face of the record" and hence affirmed the judgment.

The injustice of this action is apparent. The court deliberately turned its back upon the evidence, which was part of the record, and refused to give it any consideration, and declaring in a few words that no error appeared upon the face of the record, *excluding the evidence* from consideration, the judgment should be affirmed.

Now, in *Stringfellow vs. Cain, supra*, involving analogous practice act, this court said:

> "In short, the supreme court of the Territory was called upon to determine whether, *according to the justice of the case as shown by the record*, the judgment of the district court was right."

With the evidence in this case forming part of the record, is it not plain and positive that injustice has been done?

Salina Stock Co. vs. Salina Creek Co. (*supra*).

Is it not clear that the supreme court of Arizona has denied this appellant that justice to which he was clearly entitled by refusing to review the evidence under a plain, sufficient, and comprehensive assignment of error, whereby it became the duty of that court to review all of the evidence in order to determine, as we submit it was bound to do, "the justice of the case as shown by the record"?

In legal effect the action of the supreme court of Arizona put the case in that court in precisely the attitude it occupies here under the practice act of 1874, by refusing to review the entire record and treating the case as if it stood only for consideration upon "the face of the record" *dehors* the evidence.

It is in no sense necessary here to sacrifice substance to form, because the entire record demonstrates that Ward stood faithfully by his agreement, and sought only to recover the balance due him thereunder.

Respectfully submitted,

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